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NO. 1129

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

EUNICE JANOUSEK

Petitioner

vs.

EFFIE D. CHATTERTON
ELIZABETH CHATTERTON

Respondents

Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

---

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled

cause on November 23, 1966, affirming an order of the United States District Court for the District of Columbia entered on June 17, 1965.

CITATION TO OPINIONS BELOW

The judgment of the Court of Appeals was entered without opinion. That judgment and the District Court order are included in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on November 23, 1966. Petition for rehearing was denied on December 14, 1966. Jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

QUESTIONS PRESENTED

Whether the District Court may proceed toward adjudication of the action, notwithstanding its divestiture of jurisdiction during an appeal in the action.

Whether the District Court for the District of Columbia is also governed by the decisions of this Court and those of the courts in the several circuits declaring that upon an appeal taken the district courts are divested of jurisdiction, must maintain the status quo and are not empowered to act except in aid of the appeal and in the several instances specified in the Federal Rules of Civil Procedure.

Whether an applicant may be denied intervention as of right under Rule 24(a) F. R. C. P. on a motion to intervene and a complaint showing she will be without representation and will be bound by any judgment in the action.

APPLICABLE FEDERAL RULES

Federal Rules of Civil Procedure. Rule 24(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; * * *

STATEMENT OF THE CASE

In accordance with the provisions of Rule 24(a) F. R. C. P., petitioner applied for intervention in this action in the District Court. By timely motion circumstances were pleaded showing violations of petitioner's rights by the respondents, violations which were an integral part of the action, with resulting damage to petitioner. The application also showed with certainty that petitioner was without representation and that she would be bound by any judgment in the action.

Denying the motion on May 27, 1965, the District Judge delayed entering a written order on his ruling for three weeks. On June 17th the order entered included a provision which negatived the effectiveness of any appeal taken from it. For it provided that irrespective of any appeal taken on the order,

the District Court proceedings should resume. In an opinion filed on June 17th, the District Judge, against the great tide of decisions directly to the contrary, declared that a notice of appeal does not divest the lower court of jurisdiction but reserves to lower court judges the power to predetermine the validity of appeals taken; and if the lower court in that predetermination believes an appeal to be without merit, the District Court does not lose jurisdiction, but retains control and jurisdiction over the action and is empowered to proceed with the litigation notwithstanding the appeal taken.

In the appeal taken from that order, petitioner filed two briefs discussing numerous cases in the federal circuits, showing the utter conflict between the ruling and judgment of the District Judge below and prevailing federal practice; the conflict of the judgment entered in the District Court with the extensive federal appellate and district court decisions declaring the rule of jurisdiction during appeals to be just to the contrary.

On November 23, 1966 the United States Court of Appeals entered a judgment, without opinion, affirming the District Court judgment.

REASONS FOR GRANTING THE WRIT

The judgment of the Court of Appeals affirming a District Court judgment, without opinion, has overlooked a practice under which the right of appeal may be procedurally circumvented and effectively nullified.

If, contrary to usual jurisdictional rules and restraints, a District Judge may, as has occurred in the District Court judgment concerned here, order that the cause shall proceed in the District Court notwithstanding an appeal is in progress; and if a District Judge may, as has occurred here, reserve to himself the right to preview an appeal from his orders and judgments, predetermine the appeal's merit, and by his predetermination decide whether jurisdiction has passed to the Court of Appeals, or is retained in the District Court, the right of appeal and due process are rendered meaningless. For under this reasoning, and the District Court judgment entered in this case on June 17, 1965 on that reasoning, the District Court action can proceed to full adjudication to the exclusion of the appellant, indeed all appellants, and rights of appellate review before any appellate determination can be had.

The District Court judgment in this case is, of course, entirely at variance with and countermands basic concepts and jurisdictional principles frequently declared by this Court. In Midland Terminal Co. v. Warriner (8th Cir. 1923), 294 Fed. 185, the decisions of this Court giving the rule are reviewed.

The fundamental rule that the filing of a notice of appeal in accordance with Rule 73 F.R.C.P. transfers jurisdiction to the appeals court and divests the district courts of jurisdiction to proceed (except in aid of the appeal) until return of the mandate, is observed in every federal circuit where the question has arisen. From the numerous federal decisions uniformly enforcing the rule, petitioner respectfully submits the following as representative:

Bergeron v. Mansour (1st Cir. 1945), 152 F2d 27

Daniels v. Goldberg (S.D.N.Y. 1948) 8 F.R.D. 580

Edmond v. Moore-McCormack Lines, Inc. (2nd Cir. 1958), 253 F2d 143

Suburban Trust Co. v. National Bank of Westfield (D.C.N.J. 1963), 223 F. Supp. 259

Thompson v. Erb, Inc., (3rd Cir. 1957) 240 F2d 452

Herring v. Kennedy-Herring Co. (6th Cir. 1958), 261 F2d 202

Borgmeier v. Stone (7th Cir. 1956), 233 F2d 818

Grand Opera Co. v. Twentieth Century Fox-Film Corp. (7th Cir. 1956), 235 F2d 303

Fiske v. Wallace (8th Cir. 1940) 115 F2d 1003

Merritt-Chapman & Scott Corp. v. City of Seattle (9th Cir. 1960), 281 F2d 896

Switzer v. Marzall (D.C. Dist. Col. 1951), 95 F. Supp 721

Smith v. Pollin (D.C. Cir. 1952), 194 F2d 349

The judgments of both lower courts are further

in error, and conflict with other federal decisions in the denial of petitioner's application for intervention. Her motion and complaint set out the necessity of her intervention, and made the showing required by Rule 24(a) F. R. C. P., as construed by a number of the decisions in other circuits. Among them, petitioner respectfully submits:

Kozak v. Wells (8th Cir.), 278 F2d 104

Clark v. Sandusky (7th Cir.), 205 F2d 915

United Artists Corp. v. Masterpiece Productions (2nd Cir.) 221 F2d 213

Wolpe v. Poretsky (D. C. Cir.), 144 F2d 505

Participations Industrielles et Commerciales S. A. , 343 U. S. 156

CONCLUSION

The jusdgments of the District Court and Court of Appeals stand in irreconcilable conflict with prevailing principles of law and rules governing jurisdiction in federal appellate practice. Diverging from the mainstream of federal law, they create a precedent and hazard for all litigants whose rights of appeal could, if the ruling of the District Court were to stand, be completely circumscribed and nullified.

Though the District Judge's opinion implementing the judgment of June 17, 1965 appears not yet

to have been reported, it has caused comment and concern among members of the bar, some of whom have urged the petitioner to seek review by this petition to this Court.

To correct manifest error, to prevent confusion and jeopardy to rights of appeal and due process, and to correct the conflict now existing by the lower courts' departure from established rules, and from the decisions of this Court and those of the several circuits, all holding to the contrary, the petitioner respectfully prays for the allowance of a writ of certiorari.

Respectfully submitted,

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APPENDIX

Judgment - Filed November 23, 1966

United States Court of Appeals for the District of Columbia Circuit, Nos. 19679 and 19714, Eunice Janousek, Appellant, v. Effie D. Chatterton, et al., Appellees. Appeals from the United States District Court for the District of Columbia. Before Bazelon, Chief Judge, Edgerton, Senior Circuit Judge, and Burger, Circuit Judge:

These cases came on to be heard on the records from the United States District Court for the District of Columbia, and were submitted on appellant's briefs pursuant to order of this Court entered October 12, 1966. ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgments of the District Court appealed from in these cases are hereby affirmed. Per Curiam.

* * * * *

Judgment - Filed June 17, 1965, United States District Court for the District of Columbia. Janousek v. Chatterton, Civil Action No. 796-59:

Upon consideration of the motion of Eunice Janousek to intervene as a plaintiff in this action, the annexed proposed complaint in intervention, the memoranda of points and authorities filed in support of and in opposition to the motion, and the arguments of the applicant for intervention and counsel for the defendants, and it appearing to the Court that the applicant for intervention is not entitled to intervention pursuant to Rule 24(a) or

24(b) of the Federal Rules of Civil Procedure either as a matter of right or as a matter of exercise of the Court's discretion, and it further appearing to the Court that, for the reasons set forth in its opinion this day filed herein, further proceedings in this action in this Court should not be materially delayed by reason of any appeal from this order that may be taken, it is this 17th day of June 1965, ORDERED that the motion be and hereby is denied; and it is further ORDERED that all further proceedings in this action in this Court be and hereby are stayed for a period of 15 days from the date hereof; and it is further ORDERED that upon the expiration of said 15 day period the proceedings in this action in this Court shall resume unless sooner stayed further by a Court of superior jurisdiction. (S) Spottswood W. Robinson, 3rd, Judge